of im-
duties
nority
t that

on.

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 7 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1938.

No. 55.

A. E. McDONALD, *Petitioner*,

v.

ERNEST O. THOMPSON, ET AL.

BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW.

JOHN E. BENTON,
General Solicitor;

CLYDE S. BAILEY,
Assistant General Solicitor,
7411-15 New Post Office Bldg.,
Washington, D. C.

November 7, 1938.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
ARGUMENT	5

CASES AND STATUTES CITED.

Bradley v. Public Utilities Commission, 289 U. S. 92	5
Buck v. Kuykendall, 267 U. S. 307	5, 10
Clark v. Poor, 274 U. S. 554	11
Erie Railroad Co. v. Board of Public Utility Comm'rs, 254 U. S. 394	8
Illinois Central R. R. v. Public Utilities Commission, 245 U. S. 493	9
Kelly v. Washington, 302 U. S. 1	12
Morris v. Duby, 274 U. S. 135	8
South Carolina Highway Commission v. Barnwell Bros: Sup. Ct. Advance Opinions L. Ed. Vol. 82, page 469	12
Sproles v. Binford, 286 U. S. 374	6
Sprout v. South Bend, 277 U. S. 163	11
Stephenson v. Binford, 287 U. S. 251	6
State of Texas v. Eastern Texas R. R. Co., 258 U. S. 204	13
United States v. Delaware & Hudson Co., 213 U. S. 366	13
Motor Carrier Law of Texas	10

IN THE

Supreme Court of the United States

October Term, 1938.

No. 55.

A. E. McDONALD, *Petitioner,*

v.

ERNEST O. THOMPSON, ET AL., *Respondents.*

BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners is a voluntary Association embracing within its membership the members of the regulatory commissions and boards of the several states of the United States, except Delaware, which has no state regulatory commission, and New York, the commissions of which are not at present actively identified with the Association.

By the constitution of the Association, the President of the Association and the Executive Committee, or either of

them, may direct the General Solicitor to appear on behalf of the Association (as distinguished from the particular commissions represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. This brief, by leave of court, is filed on behalf of said Association, in the general public interest, by direction of the President and of the Chairman of the Executive Committee of said Association.

STATEMENT OF THE CASE.

The petitioner in 1934 applied to the Railroad Commission of Texas for a certificate granting authority to operate in interstate commerce over a certain specified route in Texas. After a full hearing this application was denied on July 14, 1934. From this denial the petitioner appealed to the State District Court. That Court entered a judgment in favor of the petitioner and granted an injunction restraining the Railroad Commission from interfering with the operations of the petitioner. The Railroad Commission thereupon appealed to the Court of Civil Appeals of Texas. That Court on January 8, 1936, reversed the District Court, sustained the order of the Commission, and ordered the injunction dissolved. That judgment became final.

The facts found by the Commission, and the grounds upon which it refused to grant a certificate to the petitioner were summarily stated by the Court of Civil Appeals as follows:

> "The order of the commission denying the permit found numerous facts as to the use of the highways generally by trucks, including several of the highways on which McDonald proposed to operate in and about designated cities, the injuries such operations would inflict upon portions of such highways, the dangers to the traveling public thereon occasioned by such operations, and refused the permit, obviously on the ground

that, as to at least portions of the highways sought to be used, such operation would place an undue burden upon the physical properties of the highways themselves, would endanger public safety, and would interfere with the use thereof by the public." (90 Southwestern 2d 581.)

Following this decision, the petitioner thereafter operated without a permit in Texas, claiming that the Motor Carrier Act of 1935 had operated to vest exclusive jurisdiction and authority in the Interstate Commerce Commission to regulate interstate motor carriers, and that the Railroad Commission of Texas, after the enactment of that statute was without jurisdiction as to their operation. This action was brought in the District Court of the United States for the Northern District of Texas to restrain the respondents, who constitute the Railroad Commission of Texas, and other law enforcement officers from interfering with the petitioner or his employees while engaged in the interstate operation of trucks within the State of Texas.

The respondents in their answer aver that the highways over which the petitioner sought to operate are not in such a condition as to justify the issuance of any permit to him, and that said highways are now so congested that his operation would unreasonably interfere with the use thereof by the traveling public. The respondents further aver in their answer, in substance, that said Railroad Commission claims jurisdiction to determine whether or not the highways over which any motor carrier operation is proposed to be carried on in Texas are of such construction, or the traffic thereon is in such congested condition that the proposed operation would unreasonably interfere with the use of the highways by the traveling public; and averred that it would exercise such jurisdiction upon application by the petitioner for a certificate to transport property for hire in interstate commerce. The respondents further aver, however, that upon such application they would not require the petitioner to prove that

public convenience and necessity requires the proposed service, nor would the Commission consider the adequacy of existing transportation facilities, nor the effect of the proposed operation upon other transportation facilities.

The District Court was of the opinion that the Motor Carrier Act of 1935 had superseded Texas law in so far as such law gave to the Railroad Commission power to forbid use of the highways for trucks engaged exclusively in interstate commerce. It accordingly granted the injunction prayed for. Upon appeal this injunction was set aside by the Court of Appeals for the Fifth Circuit.

Considering the provisions of the Texas statute, as construed in certain cases, the Court of Appeals said:

> "It is plain, therefore, that the Legislature of Texas undertook to vest in the Railroad Commission full jurisdiction over the public highways of the state of Texas, and imposed the duty upon it to protect and preserve the highways of the state and to secure the safety of the traveling public thereon. Appellee, as above stated, contends that this authority is vested exclusively in the Interstate Commerce Commission by the Motor Carrier Act of 1935, 49 U. S. C. A. 301 seq.
>
> "The Legislature, in the exercise of its police powers, has the authority to preserve its highways and protect the safety of the traveling public so long as its acts are not in direct conflict with an act of Congress regulating interstate commerce over highways. * * * The subject of protection of the highways in so far as they may be used for interstate commerce does not require uniformity of action, and, as a matter of fact, there is no uniformity of action by the various states at this time. The Interstate Commerce Commission has jurisdiction over the commercial considerations appertaining to the interstate truck business, but the preservation and safety of the roads themselves has been left with the state commissions. * * * The Interstate Commerce Commission under the act has the power and exclusive authority to pass upon such applications and to refuse them. If it should refuse one,

then such applicant would not be permitted to engage in interstate commerce. This is made clear by the act. That provision, however, is not in direct conflict with the provisions of the motor truck laws of the state of Texas which require the Railroad Commission of the state of Texas to determine whether or not the preservation of its highways and the safety of the traveling public will be endangered if there is an excessive amount of traffic on the highways. The determination of that question has been left to the States." (95 Fed. (2d) 942-943)

The question presented now to the Court is this:

Did the Motor Carrier Act of 1935 operate to supersede the provisions of the Texas statute which make it the duty of the Railroad Commission of Texas to regulate and supervise the operations of motor carriers upon the highways so as to preserve the highways themselves from unreasonable destruction and to keep the same reasonably safe for public use.

ARGUMENT.

Prior to the enactment of the Motor Carrier Act of 1935 a case similar to this case was before this Court in *Bradley* v. *Public Utilities Commission*, 289 U. S. 92. In that case the Ohio Commission had denied a certificate of convenience and necessity to a carrier desiring to operate in interstate commerce, because, as the state commission found, the route was "so badly congested by established motor vehicle operations that the addition of the applicants' proposed service would create and maintain an excessive and undue hazard to the safety and security of the traveling public and the property upon such highway."

Distinguishing that case from *Buck* v. *Kuykendall*, 267 U. S. 307, and other cases where state commission orders refusing certificates were held ineffective to prevent operation in interstate commerce, the Court said:

"But there promotion of safety was merely an incident of the denial. Its purpose was to prevent competion deemed undesirable. The test employed was the adequacy of existing transportation facilities; and since the transportation in question was interstate, denial of the certificate invaded the province of Congress. In the case at bar, the purpose of the denial was to promote safety; and the test employed was congestion of the highway. The effect of the denial upon interstate commerce was merely an incident.

"Protection against accidents, as against crime, presents ordinarily a local problem. Regulations to insure safety is an exercise of the police power. It is primarily a State function, whether the locus be private property or the public highways. Congress has not dealt with the subject. * * * The Commerce Clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety." (289 U. S. 95).

Another recent decision of this Court dealing with this very Texas statute was *Sproles* v. *Binford,* 286 U. S. 374, 388. In that case this Court declared:

"The limitation, by Section 5, of the net load on trucks to 7,000 pounds is attacked as an arbitrary regulation depriving appellants of their property without due process of law. * * * In exercising its authority over its highways the State is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the State may also prevent the wear and hazards due to excessive size of vehicles and weight of load." (286 U. S. 388).

Again in *Stephenson* v. *Binford,* 287 U. S. 251, the Court upheld the right of the State of Texas to regulate the charges of contract carriers for the purpose, among others, of lessening traffic upon the highways and rendering them more safe.

These cases would appear conclusively to sustain the judgment below, unless the effect of the Motor Carrier Act

of 1935 was to vest power to regulate, for the purpose of preserving the highways and the safety of the public traveling thereon, exclusively in the Interstate Commerce Commission.

We question the constitutional power of Congress to disable the states to protect their highways, and to adopt reasonable regulations governing the use thereof, for the protection of the public traveling thereon; but Congress did not attempt any such disablement in the Motor Carrier Act, 1935. The purpose of Congress, on the contrary, to preserve the proper authority of the States was made manifest. In Section 202(a) it was declared to be the policy of Congress to "cooperate with the several States and the duly authorized officials thereof" in the administration of the statute. Section 205(b) requires the Commission to refer most cases in which not more than 3 States are involved to joint boards, composed of nominees of State commissions. Section 216(e) expressly forbids the Interstate Commerce Commission to prescribe intrastate rates for any purpose whatever, while Section 202(c) declares that nothing in the Act shall be construed to "interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

These several provisions are significant as bearing upon the question now under consideration because they evidence the solicitude exercised by Congress to preserve State powers, and to enable State commissions to have a part in the administration of the Federal statute. While Congress was thus carefully preserving state powers by expressly withholding from the Interstate Commerce Commission power, which, as to rail carriers, it had before vested in that Commission, it will not be supposed that it can have designed the latter destruction of the police power of the states to preserve and keep safe their highways, unless such intent was made evident by very clear language.

Decisions of this Court made before the enactment of the Motor Carrier Act of 1935 had emphasized the impor-

tance of this power of the states. In *Erie Railroad Co.* v. *Board of Public Utility Commissioners*, 254 U. S. 394, 410, speaking through Mr. Justice Holmes, the Court, in upholding an order of the State commission requiring large expenditures for highway safety, said:

> "Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power * * *".

In *Morris* v. *Duby*, 274 U. S. 135, 143, 144, when a truck owner operating over a federal aided highway contested the legality of a state commission order reducing the permissible weight of truck load from 22,000 pounds to 16,500 pounds, Chief Justice Taft said:

> "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. * * *"

We do not question the plenary power of Congress to regulate interstate commerce and the instrumentalities whereby such commerce is moved. Such power, however, when its exercise will result in curtailment of the accustomed powers of the states with relation to their internal affairs, however far reaching the federal power may be, can be exercised only after Congress, acting directly or through some appropriate agency, has found the exercise to be necessary for the protection of that commerce which, by the Constitution, has been committed to the regulation of the federal government.

The intent of Congress must be made clear.

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." (*Illinois Central R. R.* v. *Public Utilities Commission*, 245 U. S. 493, 510 and cited cases)

As was pointed out by the court below, the Motor Carrier Act of 1935 does not undertake to regulate operation of motor carriers for the purpose of protecting the highways, or of keeping the same safe for public use; and no provision of the Act evidences an intention to negative regulation for these purposes by the states.

Counsel for the Interstate Commerce Commission have filed a brief, in support of the application for certiorari in this case, in which various cases are cited in support of the proposition that when Congress has asserted its paramount legislative authority, over a particular subject of interstate commerce, State laws upon the same subject matter are superseded.

That principle of law, of course, is so well settled as not to be questioned. The argument in the brief, however, is based upon the erroneous assumption that the Federal Motor Carrier Act and the Texas Motor Carrier Act, with respect to certificates of convenience and necessity, respectively cover the same particular subject-matter.

It is true that each statute authorizes the regulatory commission administering the same to issue what are termed certificates of convenience and necessity, but the regulatory purposes which the statute makes it the duty of the regulatory commission to accomplish are much broader under the Texas statute than are those aimed to be accomplished by the federal statute.

The federal statute, in Section 203(a), specifies the findings which the Commission must make as a prerequisite to the granting of a certificate. It must find the applicant "fit, willing and able to perform the service proposed." And it must also find "that the proposed service * * * is or will be required by the present and future convenience and necessity". If those facts are found "a certificate shall be issued". There is thus definitely excluded from the consideration of the Interstate Commerce Commission any question of the effect of the proposed operation upon the preservation of the highways to be used, or upon the safety of the public upon the highways.

The Motor Carrier Law of Texas, on the other hand, contains a declaration of policy in Section 22(b) in part as follows:

> "The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; * * * and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

Section 4(d) of the Act provides:

> "(d) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters whether specifically mentioned herein or not so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public."

This Court has heretofore held that notwithstanding the rule laid down in *Buck* v. *Kuykendall*, 267 U. S. 307, a state

may require an interstate carrier to obtain a certificate denominated a "certificate of convenience and necessity," for the accomplishment of a purpose of regulation within the power of the State, if no attempt is made to extend the exercise of State power to matters which have been held beyond the reach of such power. (*Clark* v. *Poor*, 274 U. S. 554) The right of a state to require insurance, taken out for the protection of others than passengers, from an operator of a bus engaged exclusively in interstate commerce, was recognized in *Sprout* v. *South Bend*, 277 U. S. 163, 172.

Cases such as those cited upon the Interstate Commerce Commission brief, dealing with railroads and other public utilities which operate on private rights of way, have little relevancy to the question now under discussion, for the reason that those cases did not involve the right of a state to preserve property of the State so vitally necessary to the continuance of civilized existence as are the highways of a state, and the right to preserve also the lives of its people, who are continually compelled to make use of those highways. If any police power of the state is indestructible by Congress such power must be.

It would not be questioned that a state may restrict the speed of motor vehicles upon its highways, and compel the observance of traffic regulations which may be established for the control of traffic in towns and cities. Engagement in interstate commerce can not free operators of motor vehicles from the obligation to conform to the laws of a state in these respects, while operating within the state; and regulation by the Federal Government of the entry of motor carriers into the business of supplying interstate transportation service can not have the effect of nullifying state laws which govern the use of the highways. For example, if a state or municipality has constructed a parkway and restricted its use to passenger vehicles, a motor truck operator may not drive his truck upon that parkway merely because he holds a certificate of convenience and necessity from the Interstate Commerce Commision: also, if he vio-

lates the speed law of the state, he may be arrested and punished under the state law, notwithstanding his certificate.

This case is the same in principle as *South Carolina Highway Commission* v. *Barnwell Brothers*, decided at the last term of this Court. This case, like that case, involves the right of a state to impose regulations upon interstate carriers designed to preserve the highways of the State from destruction. That case involved both regulations as to weight of vehicles, designed to preserve the highways, and as to size, designed to preserve safety of travelers upon the highway other than operators or passengers in the vehicles affected. Counsel for the carrier in that case, and counsel for the Interstate Commerce Commission as well, made substantially the same arguments as to the asserted necessity for uniformity in regulations as to all interstate carriers in all the states as are made in this case. The Court, however, sustained the state regulations saying:

> "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse." (Advance Opinions, U. S. Supreme Court, L. Ed., Vol. 82, pages 469, 474.)

To the effect that partial occupation of the regulatory field by the federal government through the promulgation of safety regulations does not inhibit state action in the field not occupied, see *Kelly* v. *Washington*, 302 U. S. 1.

In view of the complete absence from the Motor Carrier Act of 1935 of any language granting to the Interstate Commerce Commission jurisdiction to exercise regulatory power for the purpose of preserving public highways and the safety and convenience of their use by the public generally, and the like absence of any provision therein expressing the purpose of Congress to inhibit the continued exercise by the states of regulatory power for that purpose, we contend that there is no ambiguity in the statute in this respect, and that it was the clear purpose of Congress to leave state power in this field unaffected. If, however, an opposite construction of the statute be possible, it is certainly not free from doubt; and the constitutional question presented by such opposite construction would be of such serious character as to lead the court to refrain from adopting such construction.

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Delaware & H. Co.*, 213 U. S. 366, 407, 408. *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217.

Respectfully submitted on behalf of the National Association of Railroad and Utilities Commissioners.

JOHN E. BENTON,
General Solicitor;

CLYDE S. BAILEY,
Assistant General Solicitor.